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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN E. JAHN, GREG TUCKER, and
CINDY TUCKER,

Appellants-Defendants,

VS.

PATRICK HOGAN and CYNTHIA HOGAN,

Appellees-Plaintiffs.

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No. 02A04-0604-CV-210

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0107-CP-1357

September 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants Greg and Cindy Tucker (collectively, “the Tuckers”) and Steven Jahn (“Jahn”) appeal an order of the Allen Superior Court providing that Jahn is liable for damages and punitive damages attributable to his fraud in a real estate transaction, and also liable for contract-based attorney’s fees, and the Tuckers are liable for nuisance and for interference with an easement possessed by Patrick and Cynthia Hogan (collectively, “the Hogans”) across a pond touching the Tucker and Hogan properties. We affirm in part, reverse in part, and remand for further proceedings with respect to damages.

Issues

Jahn raises the following issues:

- I. Whether there is sufficient evidence to establish that he committed fraud or fraudulent inducement;
- II. Whether there is sufficient evidence to establish that he breached a contract with the Hogans to support the award of attorney’s fees; and
- III. Whether the award of compensatory and punitive damages is erroneous.

The Tuckers raise the following additional issues:

- I. Whether the grant of an easement to benefit the Hogans is erroneous;
- II. Whether the trial court erred by permitting the Hogans to change their election of remedies;
- III. Whether the award of compensatory damages against them is erroneous; and

- IV. Whether the trial court erroneously failed to award the Tuckers damages on their counterclaim for the Hogans' removal of dirt from the Tucker property.

Facts and Procedural History

During September of 1998, the Hogans were looking for unimproved real property on which to build a house. They located a parcel of property on Hollopeter Road in Allen County, listed with Mike Thomas & Associates for \$35,000.00 (hereinafter, "Lot 1"). An existing pond was visible but arguably not touching Lot 1 on the south side of the parcel. Lot 1 was in proximity to, but not a part of, The Preserves of Cedar Canyons subdivision, which featured a series of manmade ponds connecting to form a large pond or small lake.

The multiple listing indicated that Jahn was the listing agent and stated "Developer will provided [sic] excavation for a small lake and daylite [sic] basement." (Pl. Ex. 4.) The Steven E. Jahn Development Corporation, of which Jahn was President, had entered into an agreement on March 24, 1998 to purchase Lot 1 from the TLC Living Trust. Jahn's development company had tendered the purchase price but had not taken the deed to the property.

Patrick Hogan contacted Jahn, and he and Cynthia Hogan met with Jahn on September 7th or 8th. Jahn represented to Hogan that he had acquired Lot 1 from the TLC Living Trust and was offering it for sale for a firm price of \$35,000.00. Jahn indicated that the buyer would have access to the pond visible from Lot 1, could "take a boat on the pond, ... fish in the pond [and] put a beach on the pond." (Trial Tr. 70.) Jahn informed the Hogans that they would be responsible for a portion of the insurance and maintenance for the pond, together

with other lot owners in the Preserves of Cedar Canyons. Jahn advised the Hogans to call Cheryl Rogers, the Treasurer of the Preserves' Association, to ask about their portion of the fees.

Jahn informed Hogan that some lots he had for sale near Lot 1 would be sold for slightly less than Lot 1, because the other lots would have access to a smaller pond. One of the Hogans asked Jahn about properties for sale on the other side of the pond, and Jahn stated "they were almost twice as expensive because they were bigger lots and they were in the Association, in the Preserves of Cedar Canyon." (Trial Tr. 41.)¹ The Hogans were not interested in the more expensive lots, but asked that the original lot size of Lot 1 be increased from 2.65 acres to 3 acres. Jahn agreed to survey and deed a 3 acre lot to the Hogans. After the increase of the parcel to 3 acres, a small portion of the pond touched Lot 1.

Jahn completed an Agreement to Purchase Unimproved Real Estate, dated September 8, 1998, for the sale of Lot 1 as a 3-acre lot ("the Agreement"). Jahn inserted an expiration date of September 9, 1998. On the 9th of September, Patrick Hogan telephoned Jahn to set up a meeting to make an offer to purchase Lot 1.

On the 10th of September, Patrick and Cynthia met with Jahn. Jahn produced the substantially completed and technically expired Agreement, which he had signed to acknowledge his capacity as broker/associate for both the listing and selling entities. He had checked a box indicating he was representing both Buyer and Seller. Jahn also had handwritten in the words: "Buyer to be Granted Easement Rights to Lake at South of Track [sic]." (Jahn App. 51.) Jahn did not sign the line provided for "Unconditional Acceptance by

Seller” or the line provided for “Conditional Acceptance by Seller.” (Trial Tr. 79.)

Patrick signed the Agreement. Cynthia tendered a \$500.00 earnest money check, but did not sign the Agreement. Jahn later denied accepting the offer in that “he didn’t agree to the easement.” (Trial Tr. 225.) However, he acknowledged that he drafted no counter-offer. The parties proceeded as if an agreement for sale had been reached.

Jahn procured a survey of Lot 1, which included no reference to an easement to a lake or pond. Jahn also contacted a title company to conduct a title search and prepare a deed.² In so doing, Jahn faxed a request form but he did not recall providing the title company with a copy of the Agreement.

Patrick Hogan obtained financing through Grabill Bank, and the closing took place there, with Jahn and Hogan appearing at separate times to execute documents. On October 28, 1998, the Steven E. Jahn Development Corp. executed a Corporate Deed for Lot 1 to Hogan. The deed did not include any reference to an easement to the pond, but referenced an ingress and egress easement on the northeast corner of the property. Additionally, the deed described the property as being subject to all “easements of record.” (Jahn App. 181.) However, there were no such recorded easements. The Hogans built a house on the deeded property in 2000. They installed a geothermal home heating and cooling system with discharge lines going into the pond. Jahn dug an additional small pond between Lots 2 and 3, but that pond did not touch Lot 1.

On October 7, 2000, and again on January 19, 2001, the TLC Living Trust conveyed

¹ Plaintiffs’ Exhibit 1, a marketing brochure for the Preserves of Cedar Canyons, listed the lots at \$49,000.00 to \$97,375.00.

² Lot 1 was originally deeded to Patrick Hogan, who later quitclaimed the property to Patrick and Cynthia

land to the Tuckers (Lot 16 and Lot 17) so that the Tuckers became neighbors of the Hogans. During 2001, Greg Tucker lowered the water level of the pond between the Hogan and Tucker properties. During August of 2002, the Tuckers purchased Lot 18 from Pam and Brad Baker. Following their purchase of Lot 18, the Tuckers excavated the pond to a deeper level and placed the excavated dirt in an area approximately 20 feet inside the Tuckers' property line and parallel to the Hogan's property line. The Tuckers constructed a large earthen mound (several stories high and approximately 300 feet long) across the northern portion of their property so that the Hogans' small portion of the pond was separated from the large portion of the pond on the Tuckers' property.

On July 18, 2001, the Hogans filed a complaint for breach of contract against Jahn, and for violation of easement rights and riparian rights against the Tuckers. The Hogans subsequently filed amended complaints in which they added claims for violation of subjacent support rights, nuisance and conversion against the Tuckers and fraudulent misrepresentation and breach of agent duty against Jahn. Finally, the Hogans sought preliminary and permanent injunctions to prevent the Tuckers from obstructing the Hogans' use of the pond. The Tuckers cross-claimed against the Hogans alleging that they trespassed and illegally removed dirt from Lot 18 when it belonged to the Bakers.

On November 20, 2002, and December 12, 2002, the trial court held an evidentiary hearing on the Hogans' motion for a preliminary injunction. Jahn testified and, in response to questioning from the trial court, admitted that he "represented to the Hogans that they'll have an easement access to the lake at the south of tract." (Hogan App. 527.) However, Jahn

Hogan, as husband and wife.

contended that the Deed was the “controlling document.” (Hogan App. 524.) On January 15, 2003, the trial court issued its findings of fact, conclusions of law, and order on the request for a preliminary injunction. The trial court concluded that the Hogans “have riparian [sic] rights in the pond at the Preserves of Cedar Canyons.” (Jahn App. 124.) However, the trial court also concluded that the Hogans had not shown that their remedies at law were inadequate and thus were not entitled to a preliminary injunction.

On March 13, 2003, the Tuckers moved for summary judgment. Jahn filed a motion for summary judgment on April 22, 2003. On July 14, 2003, the trial court denied the motions for summary judgment and entered partial summary judgment in favor of the Hogans on their claim against the Tuckers for interference with riparian rights. The court ordered the Tuckers to remove the large mound of dirt parallel to the Hogans’ property and to “restore the original bank of the pond without further delay.” (Tuckers’ App. 42.) As to the Hogans’ claims against Jahn, the trial court found that a genuine issue of material fact concerning reasonable reliance precluded the entry of summary judgment.

On November 26, 2003, the trial court entered the following order:

WHEREFORE, the Court now Orders Defendants Greg and Cindy Tucker to remove a portion of the dirt wall they have constructed on their property which prevents the Hogans from the quiet enjoyment of their riparian rights. The portion of the dirt wall that shall be removed must be sufficient to permit water of the pond in question to intersect the Hogans’ property line at a point commencing 200 feet west of the southeastern most point of the Hogans’ property and running 160 feet in a westerly direction permitting a continuous portion of water of the pond to intersect and cross the Hogans’ southern property line. Sufficient water of the pond shall be made to flow over the Hogans’ southern property line to fill in the Hogans’ shoreline that existed prior to the lowering of the pond which permitted the Tuckers to build the dirt wall. The Tuckers shall have until the close of the Court of [sic] January 5, 2004 in which to remove the aforementioned portion of their dirt wall.

(Tuckers' App. 47.)

On June 24, 2004, after viewing the subject property and conducting an additional hearing, the trial court issued an order "reaffirm[ing] that the Hogans have a riparian interest in the pond" and ordering the Tuckers to "recommence the excavation and removal of dirt interfering with the Hogans' peaceful enjoyment of their riparian rights." (Hogans' App. 130-32.) The Tuckers were given thirty days in which to remove the dirt.

The matter proceeded in a bifurcated bench trial. On July 21, 2004, the trial court heard evidence of liability on the fraud and nuisance claims and on the Tucker's counterclaim for trespass. Patrick Hogan and another prospective purchaser of Lot 1 testified that Jahn held out Lot 1 as a parcel of property having access to the large pond rather than the small pond for Lots 2 and 3. Jahn testified that it was his duty to place the easement language in the Agreement upon the Hogans' request, but he never had any intention of giving the Hogans an easement and risking lawsuits from the landowners in the Preserves of Cedar Canyons.

During the trial, the parties stipulated that the Purchase Agreement was not a valid written agreement because of the expiration date and the lack of Jahn's acceptance signature. Nevertheless, the trial court found no lack of enforceability due to the Statute of Frauds because Jahn had otherwise signed the document and the parties had performed their respective obligations of tendering the purchase price and tendering the deed.³

³ Ind. Code § 32-21-1-1(b)(4) provides as follows:

A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party

On September 10, 2004, the trial court conducted a contempt hearing. Evidence was adduced that the Tuckers' restoration efforts had resulted in less shoreline for the Hogans than the one hundred and sixty feet contemplated by the trial court's order of June 24, 2004. Greg Tucker testified that he did not fully comply with the court's order regarding the dirt removal and pond restoration because a dangerous drop-off would have resulted, and he was seeking to return the pond to its 2002 appearance. The trial court ordered that Greg Tucker be confined to the Allen County Confinement Center for indirect civil contempt in order to force compliance with the court's order of June 24, 2004. However, the order was stayed for a period of thirty days to permit the Tuckers to remove the remaining earth mound.

On November 18, 2004, the trial court entered findings of fact and conclusions of law, finding Jahn liable for fraud and fraudulent inducement, and the Tuckers liable for a nuisance due to the large earthen mound. The trial court denied the Tuckers damages upon their counterclaim, because "the Hogans replaced the soil they had earlier removed as requested by Baker [the predecessor of the Tuckers]." (App. 24.) The order further provided that the Hogans "must elect, within the next thirty days ... to either rescind the contract with Jahn, return any benefits received under the contract and be returned to the status quo, or, in the alternative, affirm the contract, retain the benefits of the contract and seek damages." (App. 25.)

against whom the action is brought or by the party's authorized agent: ...

(4) An action involving any contract for the sale of land.

The statute requires that contracts for the sale of real property be in writing, and is intended to preclude fraudulent claims arising when one person's word is pitted against another's. Fox Dev., Inc. v. England, 837 N.E.2d 161, 166 (Ind. Ct. App. 2005). However, oral contracts for the sale of real property are voidable, not void. Id. Oral contracts for the sale of real property are excepted from the statute of frauds where there is part performance or promissory estoppel. Id.

If the Hogans elected to affirm the contract, they were to “have an easement in the lake at the Preserve of Cedar Canyon ... to enjoy the recreational use of the entire lake at the Preserve” and were to pay a proportionate share of maintenance and insurance. (App. 25.)⁴ The Tuckers were granted “120 days from the date of the Hogans’ election of remedies in which to abate the nuisance of the earthen mounds by removing so much of the dirt of the earthen mounds so as to return their real property in the area of the earthen mounds to the condition it was in prior to the construction of said earthen mounds.” (App. 26.) In the event that the Hogans elected to rescind the contract, the “matter of the earthen mounds [was to be] a matter between Jahn and the Tuckers” and “the matter of returning [Hogans] to the status quo and determining damages [would] be taken up as a part of the damages proceeding.” (App. 26.)

On December 20, 2004, the Hogans filed a Notice to Court of Plaintiff’s Election of Remedy wherein they elected to rescind their transaction. On June 21, 2005, the Hogans filed a Change in Election of Remedies stating their intention to retain the real estate and recover damages.

On June 21, 2005, the Hogans filed a motion for contempt against the Tuckers, alleging that the Tuckers had not removed the earthen mound and had begun dumping trash and discarded furniture on the side of the dirt mound that faced the Hogans’ property. On July 13, 2005, the trial court held a hearing on damages and the motion for contempt. At the outset, the court advised the parties that the Hogans had “made an election to rescind but then changed.” (Hearing Tr. 7.) The respective attorneys acknowledged the change, and lodged

⁴ More specifically, the trial court determined “that the Hogans have riparian rights limited to the extent of

no objection. However, the Tuckers argued for an extension of time in which to comply with the order to remove the earthen mounds, in light of the change in election of remedies. The trial court summarized the Tuckers' position:

[B]ecause of the Plaintiffs' recent election of reaffirmation of the contract, instead of rescission, that it is their position that the 120 days, pursuant to the prior Court order, commences anew, giving them additional time in which to conform to the Court's order of November 18, 2004.

(Tuckers' App. 51.) At the conclusion of the hearing, the trial court entered an order granting the Tuckers an additional thirty days to comply with the order of November 18, 2004 "[to] abate the nuisance referred to in the Court's order." (Tuckers' App. 51.)

On September 26, 2005, the trial court conducted a hearing and entered an order finding the Tuckers in contempt of court. In pertinent part, the order stated that it was "evident from the aerial photograph supplied by the Defendants themselves, that they did not comply with paragraph number 79 of the Court's order of November 18, 2004." (Hogan App. 207.) Greg was ordered committed to the Allen County Jail for thirty days. The order was stayed for ninety days to permit compliance.

On February 17, 2006, after a hearing, the trial court removed the stay and Greg Tucker was remanded to the Allen County Jail "for a period not to exceed 30 days." (Hogan App. 210.) On March 3, 2006, the trial court ordered Greg Tucker's release upon payment of a \$10,000.00 cash bond to secure the performance of the court-ordered excavation. The Tuckers were ordered to "drain the pond with all deliberate speed so that such excavation may proceed at the point in time determined by the Plaintiffs." (Tucker App. 29.) Cynthia

their lake bed but have easement access to the entire lake for recreational purposes." (Tucker App. 22.)

Hogan was to withdraw bond funds that were, in her discretion, necessary to accomplish the excavation. The Tuckers were not to interfere with the excavation, but were to make any “concerns about the removal of the residual [dirt]” known through their attorney. (Tucker App. 29.) On March 7, 2006, the Tuckers posted a cash bond of \$10,000.00, and Greg Tucker was released from custody.

On March 17, 2006, the trial court entered its order on damages. The trial court entered judgment in favor of the Hogans and against Jahn and the Tuckers, jointly and severally, for the loss of use of the pond, for the period of time from July of 2001 through November 18, 2004, in the amount of \$5,664.96.⁵ The trial court entered a judgment for additional damages against the Tuckers for partial interference with the use of the pond for the period of time from November 18, 2004 through March of 2006 in the amount of \$1,600.00. The trial court ordered Jahn to pay punitive damages of \$75,000.00.

On April 17, 2006, the Hogans filed a Motion to Correct Error seeking attorney’s fees. On June 6, 2006, the trial court granted the motion and ordered Jahn to pay attorney’s fees incurred by the Hogans in the amount of \$30,632.60.

On June 26, 2006, the trial court conducted a contempt hearing. The trial court found that the Tuckers “have wholly failed to abide by the Court’s Order of March 3, 2006 [to] drain the pond so that the Plaintiffs could proceed with the excavation of the residue of the earthen wall.” (Hogans’ App. 213.) The Tuckers were ordered to drain the pond within

⁵ The trial court determined that the loss of use of the pond was \$6,744.00 per acre. Accordingly, because the Hogans owned three acres, the total diminution in value was \$20,232.00. The trial court multiplied that figure by 8%, representing the time value for the period of the loss. That product, \$1,618.56, was then multiplied by the three and one half year period from the date of the lawsuit until the court entered its findings and conclusions on the issue of liability.

seven days or risk commitment to the Allen County Jail. On July 13, 2006, the trial court ordered Greg jailed for contempt.

On July 21, 2006, the trial court held a hearing on the Tuckers' "Motion to Release Defendant from Jail and Response to Contempt" and Plaintiffs' "Motion to Release Funds." (Tucker App. 217.) The trial court found that the Tuckers had drained the pond sufficiently to permit the Hogans to proceed with the excavation of the residual dirt. The trial court directed the Allen County Clerk of Courts to release \$5,000.00 from the \$10,000.00 cash bond to the Hogans so that the excavation could commence. The Sheriff of Allen County was directed to release Greg Tucker from the Allen County Jail. At the conclusion of a hearing conducted on November 7, 2006, the trial court ordered the \$5,000.00 balance of the cash bond returned to the Tuckers.

Jahn and the Tuckers now appeal.

Discussion and Decision

I. Fraud

A. Standard of Review

When, as here, the trial court finds the facts specially and states its conclusions thereon pursuant to Indiana Trial Rule 52, the court on appeal shall not set aside the findings or judgment unless clearly erroneous. State Farm Mut. Auto Ins. Co. v. Leybman, 777 N.E.2d 763, 765 (Ind. Ct. App. 2002), trans. denied. We review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Evans v. Med. and Prof'l Collection Servs., Inc., 741 N.E.2d

795, 797 (Ind. Ct. App. 2001). We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we neither reweigh the evidence nor assess witness credibility. Id. However, appellate courts owe no deference to trial court determinations deemed questions of law. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001).

B. Analysis

The trial court concluded that Jahn's oral and written misrepresentations to the Hogans concerning the property for sale were fraudulent. Jahn contends that the evidence does not establish that he committed fraud or fraudulent inducement, as determined by the trial court, because he did not misrepresent a past or existing fact.

The elements of actual fraud are as follows:

- (1) a material representation of past or existing facts which
- (2) was false,
- (3) was made with knowledge or reckless ignorance of its falsity,
- (4) was made with the intent to deceive,
- (5) was rightfully relied upon by the complaining party, and
- (6) proximately caused injury to the complaining party.

Bilimoria Computer Systems, LLC v. America Online, Inc., 829 N.E.2d 150, 155 (Ind. Ct. App. 2005). Actual fraud may not be based upon representations of future conduct, on broken promises, or on representations of existing intent that are not executed. Id.

Fraudulent inducement occurs when a party is induced through fraudulent misrepresentation to enter into a contract. Lightning Litho, Inc. v. Danko Indus., 776 N.E.2d 1238, 1241 (Ind. Ct. App. 2002), trans. denied. The essential elements of fraudulent inducement are no different from any other action on fraud; accordingly, the action may not

be predicated upon representations of future conduct. Siegel v. Williams, 818 N.E.2d 510, 515 (Ind. Ct. App. 2004). While an oral promise as to future conduct will not support an ordinary fraud action, such promise may form the basis of a constructive fraud action if the promise induces one to place himself in a worse position than he would have been in had no promise been made and if the party making the promise derives a benefit as a result of the promise. Id.

Jahn and the Tuckers contend that Jahn did no more than make a promise to do something in the future because he inserted into the Agreement a written statement that the buyer of Lot 1 was to be granted easement rights. This portends future conduct. However, we disagree that Jahn's representations were limited to promises of future conduct, inasmuch as he made several false statements to the Hogans concerning the present attributes of the parcel of property. Cynthia Hogan testified that Jahn described access to the pond as follows:

This property is ideal not only for a walk out basement because it is – backs up to this pond, you can walk right out of your basement if you put a walk out basement, walk right up to the pond, it'll be great for fishing, for paddle boating, for swimming, and I would suggest putting a pier over here because this area over here is a little lower. That may be where you want to put your beach.

(Trial Tr. 380.) Patrick Hogan testified as follows:

When we were talking about the purchase agreement [Jahn] said, I put it right here, "easement, access to lake at south of tract," and said that that was there to protect us and I took that to mean that because of the fact we weren't part of the Preserves of Cedar Canyon that was in there to make sure that it was known that we had use and access and that we would be liable for a portion of the insurance and the treatment of the pond.

(Trial Tr. 26.) Jahn informed the Hogans that the asking price of Lot 1 was higher than the others “because it had access to a bigger lake and that they were going to be sharing a small pond and that [Hogans] were going to be able to do more.” (Trial Tr. 23.) Additionally, Jahn told the Hogans “when the other lot sold they were going to extend that pond further down to the east and that was going to give [Hogan] more shoreline.” (Trial Tr. 39.) The statements of Hogan’s right to enjoy the entire pond and look forward to more shoreline concerned the present attributes of the parcel of property. Indeed, Jahn conveyed the information that the lot for sale at the listed price included lake access for liberal recreational purposes, while Jahn was aware that the owner of Lot 1 would have minor shoreline and no easement rights.

Jahn misrepresented his present plan and intention with respect to the subject real estate; he claimed he would grant an easement when his specific plan was not to grant such an easement. He also specifically claimed to be acting in the interests of the Hogans to induce their purchase of the property offered for sale. Jahn’s plan to complete the real estate transaction without an easement was a then-existing fact, which he misrepresented. See Whiteco Properties, Inc. v. Thielbar, 467 N.E.2d 433, 436 (Ind. Ct. App. 1984) (holding that, in a case where a purchaser was falsely promised an unobstructed view of a lake, yet a plan for building a cabana already existed, the plan was a fact in existence at the time of the false promise). There is sufficient evidence that Jahn made a material misrepresentation of an existing fact with knowledge of its falsity and intent to deceive.

Nevertheless, Jahn and the Tuckers contend that the Hogans had no right to rely upon the misrepresentation. In their view, the Hogans should have discerned from the deed and closing documents that no easement was conveyed. “A purchaser may rely on statements of

fact made by the seller which are not obviously false and where the buyer lacks facilities for ascertaining the truth, as where the facts are peculiarly within the knowledge of the seller.” Id. at 437.

Jahn held himself out to be the representative of both the buyer and the seller. Jahn told the Hogans that he inserted an easement provision for their protection, yet he had no intention of fulfilling Hogan’s expectation of an easement across any other landowner’s property. Jahn’s normal business practice, as described by several of Jahn’s customers, was that Jahn would have a Purchase Agreement completed, but unsigned, to present to the buyer. The buyer need only affix his or her signatures. At the Hogan closing, Jahn and Hogan appeared at different times, affording Hogan no opportunity to review the closing documents with Jahn. In light of these circumstances, there is sufficient evidentiary support for the trial court’s finding of reasonable reliance.⁶

II. Breach of Contract – Attorney’s Fees

In their motion to correct error, the Hogans sought attorney’s fees pursuant to Indiana Code 26-1-2-721 and also pursuant to the Agreement (which provided in Section 22.02 for the payment of attorney’s fees incurred by Buyer due to Seller’s breach). In ruling upon the motion to correct error, the trial court awarded the Hogans \$30,632.60 in attorney’s fees, based upon the contractual provision for attorney’s fees in the written Agreement. In so

⁶ Although there is sufficient evidence to support each essential element of actual fraud, the evidence would also support a claim of constructive fraud. Constructive fraud is that which arises by operation of law from conduct that, if sanctioned by law, would secure an unconscionable advantage. Whiteco, 467 N.E.2d at 437.

doing, the trial court stated, “[t]he Court in every way in its Findings and Conclusions treated the Agreement to Purchase Unimproved Real Estate between the parties as binding.” (Jahn App. 293.) Jahn challenges this award on the basis that the parties stipulated at trial that the written Agreement was invalid. We review the grant of a motion to correct error for an abuse of discretion. Walker v. Kelley, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004).

In Indiana, litigants are generally obligated to pay their own attorney fees in the absence of a statute, agreement, or stipulation authorizing such an award. Dempsey v. Carter, 797 N.E.2d 268, 274-75 (Ind. Ct. App. 2003), trans. denied. However, a contract that allows for the recovery of reasonable attorney’s fees will be enforced according to its terms unless it is violative of public policy. Harrison v. Thomas, 761 N.E.2d 816, 821 (Ind. 2002), trans. denied.

At trial, the parties stipulated to facts rendering the written Purchase Agreement invalid:

Cynthia Hogan: The author [sic] has to be accepted according to this Agreement under section 11 it has to be delivered to the seller, buyer is making an offer to a seller and it expires at 11:50 p.m. on a set date. That set date for this Offer to expire was on September 9th, which would have been a day before September 10th, when we’ve already established the Hogans had met with Mr. Jahn to complete this Agreement to Purchase.

Court: So, your point is that this Agreement was invalid when you met on the 10th?

Cynthia Hogan: It would have to be.

Court: Well, you could certainly make that argument. That’s one possibility. I think Mr. Jahn has testified that, you know, he’s not absolutely certain as to the dates that these documents were completed. They do speak for themselves.

His memory seems to be a bit cloudy from six years ago. At any rate, closing occurred. I'm not sure how important it is.

Vegeler: Your honor, we'll stipulate on behalf of the Tuckers that that Agreement was invalid. We'll stipulate for the record right now, based upon counsel's representation and we'll save that whole issue for the court.

Court: Do you have any comment on that?

Cynthia Hogan: I'm sorry.

Court: Do you have any comment on his desire to stipulate?

Cynthia Hogan: If he stipulates to it I have no problem whatsoever with that, your honor.

Kabisch [Counsel for Jahn]: So stipulated, your honor.

Vegeler: So stipulated, your honor.

Court: I'm just curious, why would you want the document invalid?

Cynthia Hogan: Well, your honor, we would like to show that although the document may not have been valid at the time because of the dates both parties did some performance in reliance on this Agreement.

Kabisch: If the Agreement were invalid, your honor, the parties cannot rely on it.

Cynthia Hogan: The parties did.

Vegeler: We'll stick with out [sic] stipulation, your honor. I think it's in the record. All the parties agree.

Court: I'm not sure it matters a whole lot to me quite frankly and I'll tell you why. I think whether the document was invalid or not there was at least reliance by one party and acquiescence by the other. I came to that conclusion yesterday. It's a no brainer. There's [sic] was no rejection of the document. There may not have been acceptance but there was no rejection either. So, there's at least acquiescence. So, I'm not, I'm frankly, not troubled either way.

(Trial Tr. 287-90.) We interpret this verbal exchange by attorneys to be merely a stipulation that the written agreement was not valid on the day that it was signed by Patrick Hogan.

Although the written contract providing for the payment of attorney's fees was not properly and timely executed, the parties nevertheless acted as if the agreement were valid. Jahn's conduct constituted an acceptance of the offer to purchase, including each of its terms. Testimony established that the parties' performance was based upon the terms of the written contract, and we see no reason to exclude attorney's fees as non-enforceable when an essential term of the agreement has been breached. The trial court did not abuse its discretion by awarding attorney's fees upon the Hogans' motion to correct error.

III. Damages Payable by Jahn

The Hogans established that Jahn made fraudulent misrepresentations to induce them to enter into the real estate contract. The Hogans would not have purchased the parcel if they had been aware that there was very minimal shoreline and no easement. In an action for fraud, the injured party is entitled to compensation for damage suffered as a result of the fraudulent representation. Stoll v. Grimm, 681 N.E.2d 749, 758 (Ind. Ct. App. 1997). Generally, the rule for the measure of damages for fraud in the sale or exchange of property is the difference between the market value of the property received by the party allegedly defrauded and the value of such property at the time, had it been as represented to be by the vender. Id.

Lightning Litho, Inc., 776 N.E.2d at 1238, prescribed the measure of damages to be awarded in a claim of fraudulent inducement to enter a contract. The Lightening court observed that, generally, a party bringing an action for fraud in the inducement must elect

between two remedies. Id. at 1241. That is, the party must rescind the contract, return any benefits received and be returned to the status quo or, alternatively, affirm the contract, retain the benefits and seek damages. A party who elects to affirm a contract induced by fraudulent misrepresentation may only seek tort damages. Id.

In Lightning, a separate panel of this Court adopted the rule of other jurisdictions that the “benefit of the bargain rule,” traditionally used to measure damages in breach of contract cases, is also available to measure damages in fraudulent inducement cases, a “hybrid” of tort and contract. Id. at 1242. The Court described the “benefit of the bargain” measure of damages as “the difference between the value of the property as represented and the actual value of the property.” Id. Here, the trial court inappropriately attempted to award the Hogans the promised easement and so awarded the Hogans actual damages from Jahn based only upon a temporary diminution in value. We remand for an assessment and award of damages representing the difference between the property as represented and its actual value.

Proof that a tort was committed does not necessarily establish the right to punitive damages. Williams v. Younginer, 851 N.E.2d 351, 358 (Ind. Ct. App. 2006), trans. denied. However, punitive damages may be awarded if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness that was not the result of a mistake of fact or law, honest error in judgment, overzealousness, mere negligence, or other human failing. See id. Here, the trial court concluded that this standard was satisfied and an award of punitive damages was appropriate. The conclusion is supported by the findings of fact and evidence of record. Accordingly, on remand, the trial court may assess punitive damages in an amount not to exceed three times the compensatory

damages or \$50,000.00. See Ind. Code § 34-51-3-4.

IV. Easement

The Tuckers maintain that, regardless of any fraud on the part of Jahn, or detrimental reliance on the part of the Hogans, the trial court was not empowered to fashion a remedy involving the grant of an easement burdening the Tuckers' property and benefiting the Hogans. We agree.

An easement may be created by a grant, which requires a document identifying “with reasonable certainty the easement created and the dominant and servient tenements relative thereto.” Mackiewicz v. Metzger, 750 N.E.2d 812, 817 (Ind. Ct. App. 2001), trans. denied. An easement by necessity may arise, which requires “a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road.” Downing v. Owens, 809 N.E.2d 444, 453 n.11 (Ind. Ct. App. 2004), trans. denied. An easement may be created by prescription, which requires “actual, hostile, open, notorious, continuous, uninterrupted, adverse use for twenty years under a claim of right, or by continuous adverse use with the knowledge and acquiescence of the servient owner.” Id. at 450.

Here, the Tuckers purchased their property without notice of a claimed recreational easement for the benefit of the Hogans. The Tuckers did not grant an easement to the Hogans. Nor was there any evidence of an easement by necessity or a prescriptive easement. Essentially, the Tuckers were forced to grant an involuntary easement burdening their property and benefiting the Hogans' property without compensation to the Tuckers, because of the conduct of a third-party, Jahn. Such an involuntary easement does not rest upon legal

authority and must be reversed.⁷ See also Strodtman v. Integrity Builders, Inc., 668 N.E.2d 279, 282-83 (Ind. Ct. App. 1996) (stating in pertinent part “a court may not grant specific performance when a party no longer controls a contract’s subject matter”), trans. denied.

V. Rescission

The Tuckers also claim that the trial court erroneously permitted the Hogans to change their election of remedies without affording the Tuckers an opportunity to oppose the change.

As previously discussed, a party bringing an action for fraud in the inducement must elect between two remedies. Lightning Litho, Inc., 776 N.E.2d at 1241. One who has voluntarily chosen and carried into effect an appropriate legal remedy will not generally be allowed to thereafter resort to an inconsistent remedy. Farmers State Bank of Wyatt v. Clark Equip. Co., 582 N.E.2d 452, 457 (Ind. Ct. App. 1991). However, “a party should not be bound by an election unless he has pursued the chosen course to a determinative conclusion or has procured advantage therefrom, or has thereby subjected his adversary to injury.” Id.

Here, the Hogans made an initial election to rescind the transaction with Jahn, but had not acted upon that election. They had not actually availed themselves of the remedy of rescission. The bifurcated proceedings had not concluded. Moreover, at the hearing following the change in election, the Tuckers lodged no objection in the face of the trial court’s advisement that the Hogans had changed their election of remedies. The Tuckers have demonstrated no reversible error in this regard.

VI. Damages Payable by the Tuckers

⁷ To the extent that the trial court’s order might arguably recognize the existence of an irrevocable license enforceable at equity, we observe that an irrevocable license is subject to the statute of frauds, which requires the signature of the person to be charged. See Ind. Code § 32-21-1-1 to -17; One Dupont Centre, LLC v.

The Tuckers contend that they owe the Hogans no damages, because they did not interfere with the Hogans' easement rights. We agree with the Tuckers that they did not interfere with the Hogans' easement rights to the Tuckers' property because no such rights existed. Nevertheless, the trial court's conclusions that the Tuckers interfered with the Hogans' riparian rights⁸ and created a nuisance is supported by evidence that the Tuckers erected an immense wall of dirt very close to the Hogans' property line. The wall of dirt obstructed the Hogans' view and pond access and became a dumping ground for discarded furniture (strategically visible from the Hogans' side of the dirt mound but not the Tuckers' side). The draining of the pond affected the Hogans' riparian rights to use their own portion of the pond bed to sustain their geothermal system, as the geothermal system operated efficiently only when covered with water. In winter, without adequate water coverage, the lines froze and repair and an alternate heat source were required. Accordingly, the Hogans were entitled to damages from the Tuckers.

Our review of a damages award is limited. We do not reweigh the evidence or judge the credibility of witnesses, and we will consider only the evidence favorable to the award. Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 101 (Ind. Ct. App. 1999),

Dupont Auburn, LLC, 819 N.E.2d 507, 515 (Ind. Ct. App. 2004).

⁸ "A riparian owner acquires his rights to the water from his fee title to the shoreline." Bath v. Courts, 459 N.E.2d 72, 74 (Ind. Ct. App. 1984). An enclosed lake bordered by various riparian lot owners, not held in trust as a public freshwater lake, is not subject to the rule that the riparian owner holds title from his shoreline to the middle of the lake. Id. A riparian owner of a portion of a non-navigable lake has the right to free and unmolested use and control of that portion of the lake bed which they own and water thereon for boating and fishing. Carnahan v. Moriah Prop. Owners Ass'n, Inc., 716 N.E.2d 437, 441 (Ind. 1999). Although the Hogans' property has a relatively small portion of the pond overlapping it, they have the right to use that portion.

trans. denied. A damage award must be supported by probative evidence and cannot be based upon mere speculation, conjecture, or surmise. Id.

Realtor Ryan Hoevel testified that the value of the Hogans' land was "additionally" diminished in value "because of the physical and aesthetic difficulties present because of this nuisance" in an amount "anywhere between thirty and forty thousand dollars." (Damages Hrg. Tr. 10.) He opined that the decrease in rental value was as much as \$500.00 per month. The trial court assessed pro-rated damages based upon the years and months that the Hogans lived with diminished value. The Tuckers presented no testimony to support an alternative calculation of nuisance damages. The trial court's award of \$7,264.96 is within the scope of the evidence presented and is not clearly erroneous.

VII. Counterclaim

Finally, the Tuckers claim that they are owed compensation because the Hogans removed soil from the Baker property, which was subsequently purchased by the Tuckers.

The Tuckers bore the burden of proof upon their counterclaim. Cyr v. J. Yoder, Inc., 762 N.E.2d 148, 152 (Ind. Ct. App. 2002). In appealing from a negative judgment, they must show that the trial court's judgment is contrary to law; that is, the evidence of record and the reasonable inferences therefrom are without conflict and lead unerringly to a conclusion opposite that reached by the trial court. Northern Elec. Co., Inc. v. Torma, 819 N.E.2d 417, 421 (Ind. Ct. App. 2004), trans. denied.

In its order of November 18, 2004, the trial court concluded that the Tuckers were not entitled to damages upon their counterclaim because the Hogans replaced the soil that was

removed from the control of the Tuckers' predecessor. The conclusion rested upon the following findings of fact:

Hogan came on the land owned by the Bakers and removed dirt. Mr. Baker sent the Hogans a letter requesting that the dirt from Baker's land excavated by the Hogans in June or July of 2001 be replaced. Defendant's Exhibit A. The Hogans did so and there was no follow-up correspondence or complaint by Mr. Baker.

(Tucker App. 12) The findings of fact are supported by the testimony of Patrick Hogan that he promptly replaced the Bakers' soil upon request. The Tuckers did not present contradictory evidence or show that the Hogans' actions vis-à-vis the Bakers somehow caused the Tuckers to incur a loss. As such, the trial court properly declined to award the Tuckers damages upon their counterclaim.

The Tuckers also implicitly argue that they are due the return of more than \$5,000.00 from their performance bond. However, they have filed no claim or counterclaim against the Hogans for misappropriation of funds. As such, they have demonstrated no reversible error.

Conclusion

There is sufficient evidence to establish that Jahn fraudulently induced the Hogans to enter into a real estate contract. The Hogans are entitled to compensatory damages, punitive damages, and attorney's fees from Jahn. The Hogans are not entitled to an easement for recreational purposes burdening the Tuckers' property. The award of nuisance damages from the Tuckers to the Hogans is within the scope of the evidence and is not clearly erroneous. Finally, the trial court did not err in refusing to award the Tuckers compensatory damages from the Hogans.

Affirmed in part; reversed in part; and remanded for further proceedings on damages from Jahn.

BAKER, C.J., and VAIDIK, J., concur.